IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-356

HAROLD L. ERICKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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October Term, 1979

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The petitioner, HAROLD L. ERICKSON, by his attorneys, WILLIAM M. COFFEY and RANDALL J. SANDFORT, prays that a Writ of Certiorari issue to review the judgment and orders of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1). The decision of the United States Court of Appeals for the Seventh Circuit was rendered June 22, 1979, a Petition for Rehearing was filed on July 6, 1979, and the order denying the petitioner's Petition for Rehearing was dated August 3, 1979.

QUESTION PRESENTED

Did the Court of Appeals err when it failed to reverse count 1 of the indictment alleging a conspiracy to commit two substantive crimes when a general jury verdict was rendered and one of the crimes was reversed as a matter of law.

STATUTORY PROVISIONS

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspracy shall not exceed the maximum punishment provided for such misdemeanor. Title 18, §371, U.S.C.

Title 15, §78m(a), U.S.C., states in part:

(a) Every issuer of a security registered pursuant to section 78*l* of this title shall file with the Commission, in accordance with such rules and regulations as the commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78*l* of this title, except that the Commission may not require the filing of any material contract

wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

Title 15, §78ff, U.S.C., states in part:

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years,

or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

STATEMENT OF THE CASE

On September 21, 1977, an eight-count indictment was returned. That indictment charged the petitioner in count 1 with a violation of Title 18, United States Code, §371. Count 2 alleged a violation of §78m(a) and §78ff of Title 15, and §2 of Title 18, United States Code. Counts 3 through 8 alleged violations of §1005 and §2 of Title 18, United States Code.

In the conspiracy, count 1, the petitioner was charged with the co-defendant with a conspiracy:

To willfully and knowingly make and cause to be made a false and misleading statement of material facts in the filing of Form 10-K of the Annual Report Pursuant to §13 of the Securities

Exchange Act of 1934 of American Bankshares Corporation for the fiscal year ending December 31, 1973, with the Securities and Exchange Commission, in violation of §78m(a) and §78ff of Title 15, United States Code of Laws;

and

To willfully and knowingly make and cause to be made false entries in the books, records, reports and statements of the American City Bank and Trust Company, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to deceive the officers of said bank, the comptroller of the currency, the Federal Deposit Insurance Corporation and its agents and examiners appointed to examine the affairs of said bank, in violation of §1005 of Title 18, United States Code of Laws.

On January 19, 1978, a jury trial began which trial was concluded on February 13, 1978. On February 17, 1978, the jury returned a verdict of guilty with respect to each count in the indictment. On April 12, 1978, the petitioner filed an appeal to the United States Court of Appeals for the Seventh Circuit pursuant to Title 18, United State Code, §3772, and Rule 4(b) of the

Federal Rules of Appellate Procedure. On June 22, 1979, the United States Court of Appeals for the Seventh Circuit issued a two-part decision reversing counts 3 through 8 of the indictment and affirming counts 1 and 2. The petitioner thereafter filed, on July 6, 1979, a Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit alleging in part that the petitioner should be awarded a new trial on count 1 due to the reversal of counts 3 through 8. On August 3, 1979, the United States Court of Appeals for the Seventh Circuit issued an order modifying in part the published opinion and denying the petitioner's motion for a rehearing without discussion. The petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit pursuant to §1254(1), Title 18,

United States Code of Laws.

REASON RELIED ON FOR THE ISSUANCE OF THE WRIT.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, OTHER CIRCUITS AND OTHER DECISIONS OF THE SEVENTH CIRCUIT.

In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), this Court held that a conviction must be set aside where a verdict of guilty did not specify the grounds upon which it rested, the jury was instructed that the verdict might be rendered with respect to any one of three clauses of a statute the violation of which was charged, and one of the clauses was unconstitutional. The Court stated:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say

> under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. 366 U.S. at 368-9.

In accordance with this Court's holding in Stromberg, a number of the Circuits have held that given the invalidity of one or more substantive counts alleged to be the object of a conspiracy, that conviction cannot stand if the jury returned a general verdict. The conflict among the Circuits over this issue is most dramatically pointed out in United States v. Carman, 577 F.2d 556 (9th Cir., 1978). In Carman, the defendant was convicted of bribery, Title 18, U.S.C., §201(b); interstate

transportation of money taken by fraud, Title 18, §2314, four counts of securities fraud under Title 15, U.S.C., §77q(a) and §77x, as well as a conspiracy count alleged under Title 18, §371. Upon the reversal of the §2314 count, the Ninth Circuit considered the validity of the conspiracy count.

In Carman the appellant contended that the reversal of the interstate transportation counts also required the reversal of his conspiracy conviction. The appellant was charged in count 1 with conspiring with others to commit each of the crimes with which he was charged under the substantive counts and the jury's verdict of guilty with respect to the conspiracy count was a general verdict. The appellant argued that under those circumstances it was not possible to know which crime the jury found he

conspired with others to commit inasmuch as the jury was charged that a conspiracy with respect to any one was sufficient to enable a jury to convict under count 1. The appellant contended that the reversal of any substantive count on the ground that it failed to state a crime compelled overturning the conspiracy conviction because the jury might have concluded that conviction for conspiracy was proper only because of appellant's participation in a conspiracy with respect to the substantive offense, the conviction for which was overturned. The appellant further asserted that this possibility demolished the entire conspiracy conviction. The Ninth Circuit stated:

> We agree. The authorities are divided on this issue. We held en banc some years ago that a 'judgment must be and is reversed because it rests upon a general verdict which

may have been found upon the jury's conclusion that a conspiracy existed to violate any one, any two, or all three United States laws, set up in one count . . . ' (Cite).

***

Nevertheless, our research indicates that the Second and Sixth Circuits very likely would reach a different result. (Cites). . . . Seventh Circuit decisions appear in conflict. (Cites).

***

The Third Circuit, however, appears to support the result we reach. (Cites). . . . So likewise does the Fifth Circuit. [Emphasis supplied]. United States v. Carman, 577 F.2d at 566-567.

The Court further stated:

A determination that the conspiracy related to less than all the substantive crimes mentioned in the composite count can be the result of either an explicit decision by the jury or its failure to consider each such crime after determining that the conspiracy related to at least one.

It is the possibility of this inattention on the part of the jury that produces difficulty when one of the substantive count convictions is overturned on appeal for failure to state a crime. If the jury, when considering the conspiracy count, focused only on the crime embodied in the subsequently overturned substantive crime conviction the conspiracy conviction also should be overturned. Of course, if it focused on other crimes as well, the conspiracy conviction should be sustained. The one-is-enough charge makes it impossible to know precisely what the jury considered. Not knowing, a reviewing court must overturn the conspiracy conviction. Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently. [Emphasis supplied]. United States v. Carman, 577 F.2d at 567-568.

The Court in Carman went on to state that there were at least three ways that the difficulty could be avoided given an appropriate charge to the jury. United States v. Carman, 577 F.2d at 568. The Court in Carman correctly noted in fn. number 12 that it is possible for the conspiracy conviction to stand in an indictment even though the defendant has been acquitted on all substantive counts, because the crime of conspiracy is a separate and distinct offense and is established upon an agreement to engage in criminal activity accompanied by an overt act committed in

furtherance thereof. United States v. Carman, 577 F.2d at 567. The petitioner agrees with this proposition of law, but asserts that in this case, as in Carman, the allegation of a conspiracy to commit two substantive crimes, one of which is invalid, requires the reversal of the conspiracy count. Carman is particularly applicable in this case where the petitioner is alleged to have conspired to commit a violation of count 2, being a violation of the Securities Act, and a number of substantive counts which are later held to be invalid.

As was stated in Carman, there is a conflict among the Circuits relative to the issue presented by the petitioner. In United States v. Dixon, 536 F.2d 1388 (2nd Cir., 1976), the defendant was charged in a six-count indictment. Counts 2 and 6 charged the defendant

with a violation under Title 15; counts 3, 4 and 5 alleged violations of the mail fraud statute, 18 U.S.C., §1341. Count 1 alleged a violation of §371 of Title 18, U.S.C. The Second Circuit concluded that the mail fraud convictions could not stand but nevertheless upheld the conviction on the conspiracy count.

In United States v. Tarnopol, 561 F.2d 466 (3rd Cir., 1977), the defendants were charged in count 1 with a conspiracy to commit a violation of the Federal Mail Fraud Statute, 18 U.S.C., §1341, wire fraud in violation of 18 U.S.C., §1343, and fraud against the United States in violation of 18 U.S.C., §371. The conspiracy count accordingly had three objects of the conspiracy. The jury rendered a general verdict of guilty on the conspiracy count under

the instructions by the trial court.

The Court stated:

> Under these circumstances, it is impossible to determine whether or not the jury based its verdict upon less than all three of these activities and, if so, upon which ones the verdict was founded. In this situation, the verdict of guilty on Count 1 cannot stand if the indictment was insufficient in law in that any one of the three objectives of the conspiracy did not constitute a crime or if the evidence was insufficient to sustain a finding by the jury that any one of these activities had been engaged in. [Emphasis supplied]. United States v. Tarnopol, 561 F.2d at 474.

The Court later held:

> It follows that there was a failure of proof with respect to this particular alleged objective of the conspiracy. Accordingly, since we cannot know whether or not the jury based its verdict upon this objective alone, the verdict of guilty on Count 1 cannot stand. (Cite) [Emphasis supplied]. United States v. Tarnopol, 561 F.2d at 475.

In addition to the conflict among the Circuits whether or not a conspiracy count is valid when on appeal, one of the objects of the conspiracy

did not constitute a crime, or if the evidence was insufficient to sustain a finding by the jury that any one of the activities had been engaged in, there is also an apparent conflict as noted in Carman in the decisions of the United States Court of Appeals for the Seventh Circuit considering United States v. Tanner, 471 F.2d 128 (7th Cir., 1972), cert. denied 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed. 2d 220 (1972), and United States v. Baranski, 484 F.2d 556 (7th Cir., 1973). As noted in Carman, the Seventh Circuit held in Tanner that a conspiracy conviction stands so long as one of the objects of a conspiracy is unchallenged, and this decision appears to be in conflict with United States v. Baranski, 484 F.2d 556 (7th Cir., 1973). In Baranski, the defendants were charged in a four-

count indictment with (1) willful damage to governmental property; (2) removal, mutilation, and destruction of records; (3) interfering with the administration of the military Selective Service Act; and (4) conspiracy to commit the above offenses. The jury acquitted the defendants on the three substantive counts but convicted them on count 4. The Seventh Circuit in Baranski stated:

> . . . (T)he defendants here were named in all substantive counts referred to in count four, the conspiracy charge. Because the jury returned a general verdict on that count, we cannot know which of the three statutes the violations of which were the 'objects' of the conspiracy the jury relied on in convicting the defendant. The trial court had instructed the jury that actions taken to attain any of the three alleged objects would suffice for a conviction.
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> ***
>
> The simple fact is that we cannot say with any certainty which of the three objects was crucial to the jury's determination.
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> ***
>
> We are not unmindful of the general

statements in the cases to the effect that proof of conspiracy to violate any one of several statutes alleged in the indictment will support a conviction. See e.g., United States v. Mack, 112 F.2d 290 (2nd Cir., 1940). While we do experience some conceptual difficulties with this general statement, recognizing again that the offense of conspiracy is separate from the statutory offenses constituting the objects of the conspiracy and assuming arguendo the correctness of the general statement, we do not find the principle applicable in the particular factual situation here involved because of our inability to state the basis of the jury's determination. We decline to speculate on such a matter.

To the extent that an isolated statement that there is 'no failure or proof in the fact that one of its objects alleged as unlawful may not have been so, 'Moss v. United States, 132 F.2d 875, 878 (6th Cir., 1943), appears to be inconsistent with the result we have reached, we cannot accept the implication as being applicable here, and, if it is, we cannot accept it as good law.

The controlling matter here, in our opinion, is not the proof upon which the jury might have convicted under the conspiracy count but rather the proof upon which the jury did convict. United States v. Baranski, 484 F.2d at 560-561. [Emphasis supplied].

The Court thereafter in Baranski cited extensively from this Court's decision in Stromberg v. California, 283 U.S.

359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

In this case, the allegation of conspiracy as contained on pages two and three of the indictment herein, allege a conspiracy to commit a violation of §78m(a) and §78ff of Title 15, U.S.C., as particularly set forth in count 2 of the indictment; and violations of §1005 of Title 18, U.S.C., as set forth in counts 3 through 8. On appeal, the Seventh Circuit Court of Appeals held that counts 3 through 8 must be reversed because the allegations contained therein failed to state an offense because the entries in the books and records of the American Bankshares Corporation were recorded exactly as they occurred and therefore there was not a false entry under Title 18, §1005. As such, counts 3 through 8 failed to state an offense and as in United States v. Carman, 377

F.2d 556 (9th Cir., 1978), the substantive violations being invalid, the conspiracy count cannot stand. United States v. Carman, 577 F.2d at 567.

In the present case, the government argued that with reference to count 1, the conspiracy, that it was, "almost a pure intent statute." (R. 2187). The government thereafter stated:

> And in this case, to find the defendant guilty of count one, (the conspiracy count), all that you must find is that Fran Wilson and Harold Erickson came to an agreement, and that agreement consisted of, of an agreement to violate the law, specifically to create false entries, and that term will be defined for you by the Court, and specifically to materially understate the income of the bank for that year. In other words, to cover up losses. (R. 2188)

The government thereafter went on to advise the jury that it was sufficient to sustain the government's burden if one of the overt acts alleged in the

conspiracy count were found have been completed by the jurors. (R. 2188-9). The government thereafter argued:

> Well, the Court will instruct you that if you find existence of a conspiracy, specifically an agreement between the two defendants to violate the law, that is to hide losses, to create false entries, to materially understate the income of the bank, that then the acts of these partners in crime become admissible against each other. (R. 2190).

The Court thereafter in a discussion with counsel relative to the jury instructions, stated, "I mean the Court's view of the case is that the statute 1005 says it's against the law to file false financial statements. Now, and that's what they are being tried for." (R. 2259). The government in response to the defendant's request for certain instructions, stated, "We're not dealing with a situation where the, the government or the S.E.C. or whomever need

promulgate a specific regulation spelling out what overtrading is and why it's illegal. The general language of 1005 covers it, and it prohibits a matrix of possibilities." (R. 2260).

Further, the Court, in giving its instructions to the jury with respect to count 1, stated:

> The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods were agreed upon were actually used or put into operation, nor that all persons charged have been members of the alleged conspiracy were such. But the evidence in the case must establish, again beyond a reasonable doubt, is that the alleged conspiracy was knowingly formed and that <u>one or more of the means or methods described in the indictment were agreed upon to be used in an effort to affect or accomplish some object or purpose of the conspiracy as charged in the indictment</u>, and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment. [Emphasis supplied]. (R. 2351).

The Court further charged the jury that the defendants, including the petitioner,

alleged to have conspired to commit offenses against the United States by, "(o)ne to wilfully and knowingly make and cause to be made a false and misleading statement of material facts and the filing of the Form 10-K, . . .; and, two wilfully and knowingly make and cause to be made false entries in the books and records, and reports of the American City Bank and Trust Company, ..." (R. 2359). The jury was further advised that with respect to the elements of a conspiracy count, the government need to have proven that there was some overt act which was knowingly done in furtherance of,"some object or purpose of the conspiracy as charged." (R. 2360). The Court further advised the jury that it need find an overt act which, "must be knowingly done in furtherance of some object or purpose

of the conspiracy charged in the indictment." [Emphasis supplied]. (R. 2362). The Court further stated, "Indeed, if you find any overt act, whether it's specifically enumerated under count one of the indictment or not, was committed by any co-conspirator in furtherance of a conspiracy, then the statutory element of the overt act has been satisfied as to each and every member of the conspiracy." [Emphasis supplied]. (R. 2363).

As in Carman, the petitioner respectfully asserts that the argument of the government as well as the statements of the Court, allowed the jury to return a verdict of guilty with respect to count 1 under a theory that a finding of one of the alleged objects of the conspiracy is "enough." Similarly, as in Carman, counts 3 through 8 were

overturned because of failure to state a crime and the jury could have concluded with respect to count 1 that the object of a conspiracy was the false statements as alleged in counts 3 through 8. Accordingly, the petitioner asserts that the conviction should not stand.

Additionally, the conviction of the petitioner should not be allowed to stand because it is apparent from a review of the entire record, as well as the closing arguments of counsel for the government and the instructions of the Court, that an overwhelming amount of the evidence was relevant only to counts 3 through 8 of the indictment which the Seventh Circuit concluded as a matter of law failed to state a crime. The allegation of count 2 was merely the composite of the allegations of counts 3 through 8 as well as other "false statements" set forth as overt acts

but not specifically set forth as substantive counts. Clearly the petitioner was prejudiced by the amount of evidence introduced against him with respect to counts 3 through 8 held to be invalid. As such the conspiracy count, even in those Circuits which would allow a "one-is-enough" conspiracy to stand, should have been reversed and the failure of the Seventh Circuit to do so is in conflict with the decisions of this Court, other Circuits, and its own decisions. See e.g., United States v. Papadakis, 510 F.2d 287 (2nd Cir., 1975), cert. denied 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed. 2d 104 (1975); and United States v. Wedelstedt, 589 F.2d 339 (8th Cir., 1978).

CONCLUSION

The petitioner was convicted in count 1 of a conspiracy to violate two substantive crimes, one of which was held as a matter of law and not to

state a crime. The Circuits are clearly in a conflict as specifically stated in United States v. Carman, 577 F.2d 556 (2nd Cir., 1978), whether or not under those circumstances the conviction on the conspiracy count can be upheld. The inconsistency of the affirmation of count 1 of the indictment and the reversal of counts 3 through 8 was pointed out to the Seventh Circuit in the Petition for Rehearing filed on July 6, 1979. The denial of that Petition for Rehearing is in conflict with the decision of this Court in Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); decisions of other Circuits, specifically the Third and Fifth Circuits; and in conflict with a decision of the Seventh Circuit Court of Appeals in United States v. Baranski, 484 F.2d 556 (7th Cir., 1973). For

these reasons, it is respectfully urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-1511 and 78-1512

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD ERICKSON and FRANCIS WILSON,

Defendant-Appellants.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 77-Cr-158—**John W. Reynolds**, *Judge.*

ARGUED JANUARY 5, 1979—DECIDED JUNE 22, 1979

Before TONE and WOOD, *Circuit Judges*, and EAST, *Senior District Judge.**

TONE, *Circuit Judge.* Defendants were convicted of causing false entries to be made in the records of the bank of which they were officers and of causing false and misleading financial statements to be filed by an affiliated bank holding company, in violation of the False Banking Entry Act and the Securities Exchange Act of 1934, and of conspiring to do the same. More specifically, they were found to have failed to disclose the effect on the bank's income account of certain "overtrades," *i.e.*, security transactions executed at prices in excess of

* The Honorable William G. East, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

the prevailing market prices. In this opinion, we consider only the sufficiency of the indictment and the evidence, leaving alleged trial errors to be dealt with in a contemporaneously filed unpublished order. We affirm the convictions on the conspiracy and securities law counts but reverse on the banking entry counts.

Erickson was chairman of the board of directors of both American Bankshares Corporation (Bankshares), a holding company, and one of its subsidiaries, American City Bank and Trust Company (the bank); he was also president of Bankshares. Wilson was one of the bank's vice presidents and head of its Investment Department. Securities in the Investment Department were held in either a trading account or a portfolio account.

In early 1973 the bank, under Wilson's direction, executed a series of federal security short sales with the expectation that the market would continue to fall. When this expectation was not realized, the short sales had to be covered. Instead of borrowing the securities needed for that purpose from a third party, Wilson caused the bank to borrow them from its own portfolio and later purchase identical securities to replace them. Wilson later caused the bank to sell these "replacement securities" in the series of year-end overtrades described more fully below.

In either July or August 1973, Ernst & Ernst, who until 1974 was Bankshares' independent auditor, gave Erickson and Wilson the apparently mistaken advice that because the "short sales" had been covered with the bank's own securities, they were completed transactions; consequently the bank, and therefore Bankshares, would have to recognize any losses incurred on those transactions.[1] This loss would have approximated $800,000, a

[1] Later, after the transactions on which the indictment is based, Ernst & Ernst's successor, Arthur Anderson & Co., disagreed, reasoning that since the portfolio securities were replaced by identical securities, the latter could be carried at the "cost" of the original securities. Under this view, the portfolio account would not have been required to recognize any loss on the transaction; but Erickson and Wilson relied on

(Footnote continued on following page)

substantial amount in light of the bank's profit of only about $1,000,000 the previous year. Wilson objected, stating that "what he had done was common practice in the industry, and that he would obtain letters from other banks to support his position." [Government Exhibit (G.Ex.) 44, p. 2.] Ernst & Ernst expressed its willingness to reconsider its position if Wilson could provide such letters. After trying unsuccessfully to obtain the letters, Wilson told Erickson that some of the "replacement securities" had already been sold and most of the rest could be sold above the current market price to avoid the substantial loss threatened by the position taken by Ernst & Ernst. [*Ibid.*]

With Erickson's approval, Wilson then engaged in a series of negotiated overtrades, whereby the bank sold most of the remaining "replacement securities" not at market prices but at inflated prices. The *quid pro quo* for each of these sales was a concurrent agreement by the bank to buy from the purchaser of the "replacement securities" other securities of approximately equal value at approximately equally inflated prices. The manner in which these transactions were recorded, which avoided recognition of loss,[2] forms the basis of the indictment.

The bank recorded these transactions as if the purchases were unrelated to the sales and each side of the transaction had been an independent arms length sale and purchase. The premium received by the bank

[1] *continued*
Ernst & Ernst's contrary view at the time in question. [Tr. 1194-1198; 1259.] The anticipated loss on the short sales is relevant only because it provided the motive for what followed.

[2] Wilson and Erickson apparently executed the overtrades on the premise that if the "replacement securities" could be disposed of by year-end and other securities substituted, using inflated prices for both sales and purchases, the loss threatened by Ernst & Ernst's position on accounting for the short sales could be avoided. [*See* G. Ex. 40, p. 1.] Sale of the "replacement securities" at prices above market would avoid the anticipated recognition of unrecorded depreciation. Purchase of other securities at prices above market would establish an inflated cost basis for the new securities.

on the sale of securities was included in the sale price recorded, without reference to the agreement to pay a similar premium on the reciprocal purchase of other securities or the market value of the securities purchased. Similarly, the cost of the securities purchased by the bank was recorded at the inflated purchase price instead of their market value. Although even the inflated selling price was usually a little less than the carrying value of the securities sold, resulting in a recorded loss to the bank, that recorded loss was much less than it would have been if the price recorded had been the market value of either the securities sold or the securities purchased by the bank.

David Drought, the Ernst & Ernst audit supervisor assigned to the Bankshares' examination for the year ending December 31, 1973, was understandably curious as to why anyone would pay more for securities than the prevailing market price. In a memorandum summarizing a February 26, 1974 meeting with other Ernst & Ernst personnel he explained:

> The Money Center [the bank's Investment Department] had accomplished its goal of disposing of the issues without substantial losses but the question remained as to how other brokers could buy the securities at such inflated prices without hurting themselves.
>
> [The bank's] purchases of new and different issues prior to year-end and, in some cases, the identical issues after year-end from the same brokers, also at inflated prices provided the answer. This was the matter of concern in that the Bank appeared to have sold the securities without loss by manipulating prices and later replacing the securities or equivalents so as to put themselves back in the beginning position with substantial unrecorded depreciation on the issues.

[G.Ex. 40, p. 2.][3] Wilson's explanation was that the bank was able to dispose of the replacement securities at

[3] The purchases of identical securities after year-end referred to in Drought's memorandum are to be distinguished from the purchases of "new and different issues." Only the latter are involved in this case.

prices above the market price because, for these particular securities, there was a "seller's market" and the market prices reflected only a "thin and insufficient market." [G.Ex. 11, p. 2.] Erickson later made similar representations to the bank's board of directors. [G.Ex. 44, p. 2.]

Ernst & Ernst certified Bankshares' consolidated financial statements for 1973 without requiring any adjustments or explanation concerning these transactions, apparently taking the position that the transactions were "in substance" repurchase agreements, and therefore no gain or loss need be recognized.[4] Ernst & Ernst's successor, Arthur Andersen, disagreed, however, reasoning that since the bank had purchased securities different from those sold, the transactions could not be treated as repurchase agreements. Further, since the transactions were closed, the full loss resulting from the sale of the "replacement securities" had to be recognized. Recognition of the loss was accomplished by writing down the carrying value of the security acquired in each overtrade to its market value on the day of the acquisition and making a corresponding adjustment in the in-

[4] According to the testimony at trial, a "repurchase agreement" appears to be in substance a secured loan. It involves little more than a "sale" of securities and an obligation to repay the "sale price" plus interest on the sale price at some later date. As with any loan, the borrower would not include the amount of money borrowed as income and the collateral would not be treated as having been sold.

The Comptroller of the Currency requires banks to state separately the value of all securities sold pursuant to repurchase and similar agreements on financial statements filed with the SEC. *See, e.g.*, 12 C.F.R. § 11.71: Balance Sheet Instructions 5 (Assets), 16 (liabilities); Income Statement Instructions 1(c) (income), 6(e) (expenses); 12 C.F.R. § 206.71; Balance Sheet Instructions 4 (assets), 14 (liabilities); Income Statement Instructions 1(c) (income), 2(e) (expenses); *see also* 17 C.F.R. §§ 210.9-01(c), 210.9-05(a) (SEC regulations concerning bank and bank holding company financial statements). The transactions in question here were not reported as repurchase agreements in Bankshares' 10-K for 1973, on which Count 2 is based, but as unrelated purchases and sales.

come account reducing income, or increasing loss, in the amount of the write-down.

Counts 3 through 8 of the indictment charge both defendants with violating the False Banking Entry Act, 18 U.S.C. § 1005,[5] by causing entries relating to the purchases to be made in the bank's records that were "inflated and false in light of the true market value" of the securities when purchased, with the intent to deceive officers of the bank and others.

Count 2 charges each defendant with wilfully and knowingly making and causing to be made false and misleading statements of material fact in Form 10-K filed with the Securities and Exchange Commission for the year ending December 31, 1973, in violation of §§ 13 and 32 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(a), 78ff.[6] Specifically, Erickson and Wilson were alleged to have understated Bankshares' losses for the year ending December 31, 1973 by $423,946, about 16 per cent. The government's theory under Count 2 was that as a result of the overtrades the bank

[5] In relevant part the statute provides that

> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System shall be fined . . . or imprisoned . . . or both.

[6] Section 13 of the Exchange Act, 15 U.S.C. § 78m(a), requires every issuer of a security registered under § 12 of the Act, 15 U.S.C. § 781, to file certain reports, including an annual report, with the SEC. Bankshares is such an issuer.

Section 32, 15 U.S.C. § 78ff, provides in relevant part that

> [A]ny person who willfully and knowingly makes or causes to be made, any statement in any . . . , report, . . . required to be filed under this chapter or any rule or regulation thereunder . . . , which statement was false or misleading with respect to any material fact, shall upon conviction be fined not ...ore than $10,000, or imprisoned not more than two years, or both, ...

avoided recording the even greater losses that were in fact incurred.

Count 1 of the indictment charged each defendant with conspiring to commit the offenses charged in Counts 2 through 8, in violation of 18 U.S.C. § 371.

I.

Sufficiency of the Indictment: Counts 1 and 2

Defendants challenge the indictment on the ground that it fails to allege a crime. The gist of this argument seems to be that by alleging that the defendants made purchases of certain bonds at prices above their market value with the intent to conceal the bank's loss, *i.e.*, for the purpose of affecting income, the indictment alleges "a non sequitur"; for, defendants argue, the purchase of bonds in excess of their market price could not affect the bank's income, and "the requisite element of intent is lacking in the indictment." As a further consequence, say the defendants, the indictment did not apprise them specifically "as to what burden they must be prepared to meet at trial."

The conspiracy alleged in Count 1 is described in paragraph 12, which states as follows:

> It was a part of the conspiracy and agreed upon that HAROLD L. ERICKSON and FRANCIS M. WILSON would cause the American City Bank and Trust Company to engage in a series of deceptive securities transactions, to-wit, the American City Bank and Trust Company would sell securities to another party at prices in excess of market price, and, by prior arrangement, the American City Bank and Trust Company would purchase other securities from the same party at prices similarly in excess of market price; the false and inflated value of said purchased securities would be recorded and reflected on the books, records and statements of said bank, all for the purpose of avoiding full recognition of losses to the American City Bank and Trust Company on said books and records of said bank.

Count 1 goes on to allege a series of overt acts, which consist of purchases of described debt securities at prices that were "inflated and false in light of a true market value" that on the date of purchase was lower than the purchase price. In the case of each purchase, the purchase price and the "true market value" are specifically alleged, and it is further alleged that "the net effect of said transaction was to conceal an increase in the loss to said bank in 1973 in the amount of approximately" a specified amount.

The net effect of each of the overtrade transactions described in paragraph 12, in which the sale and purchase were reciprocal, was realization of a loss on the security sold. The alleged conspiracy was to engage in the transactions and to record the false and inflated value of the purchased securities in the records of the bank "for the purpose of avoiding full recognition of losses to the [bank] on [the] books and records of said bank."

Defendants' argument is that the recording of the purchase side of the transaction could not affect income or cause the recognition of losses to be avoided. Paragraph 12, however, although it does not mention the recording of the sale side of the transaction, describes the entire transaction, and sufficiently conveys the gist of the charge, which was overstating income. As the evidence later showed, the recording of the purchased securities at an inflated value was one aspect of the misleading statement, the other being the overstatement of income. When the statement was ultimately corrected, a write-down of the purchased securities to their actual value at the time of acquisition also required an entry adjusting the income account by a like amount. The indictment was not required to state all the intricacies of the bookkeeping and accounting entries that would result in a false and misleading statement. It was enough that the defendants conspired to make such a statement for the purpose of avoiding recognition of losses the bank had realized.

Likewise, it was not fatal to Count 1 that each of the overt acts alleged was the purchase side of the overtrade. It would have been sufficient to allege a single

overt act, and of course the overt act need not itself have been illegal.

Defendants' attack on Count 2 of the indictment is similarly without merit. The respect in which that count alleges that the Form 10-K was false and misleading was in reporting an "income loss" of $2,523,645, and omitting to include in the loss "an unrecorded loss on securities in the approximate amount of $423,946, said securities having been purchased by American City Bank and Trust Company in 1973 at prices in excess of market value." Again, we cannot say that an adjustment of the loss figure would not have resulted from adjusting the purchase price of the securities to reflect their market value at the time of purchase. In fact, as the evidence showed, the proper accounting procedure required such an adjustment to reflect the lower value of the securities purchased, which in turn required a corresponding entry in the income account reducing income and thus reflecting the loss incurred in the overtrade transactions.

Counts 1 and 2 are sufficient for the foregoing reasons. We need not consider the sufficiency of Counts 3 through 8, for we have concluded that the convictions under those counts cannot stand for another reason, to which we now turn.

II.

Sufficiency of the Evidence under Counts 3 through 8: Falsity

Each of Counts 3 through 8 charges the defendants with having made and caused to be made, with respect to a specified overtrade transaction, false entries on the bank's "order form" that were reflected in the bank's records, reports, and statements, with the intent to deceive officers of the bank and others. It is not alleged that the bank paid less than the amount recorded. Rather, the purchase price is alleged to have been "inflated and false in the light of the true market value" on the date of purchase.

The bank records introduced in evidence in support of these counts were (1) order forms, (2) confirmation

advices from the sellers, (3) debit and credit forms, and (4) pages from the general ledgers to which data from the debit and credit forms were transferred. None of these documents purports to show the market value of the purchased securities or the substance of the transactions. They purport merely to show the price at which the security transaction was executed.

Although entries recording fictitious transactions or inaccurately recording actual transactions are false within the meaning of 15 U.S.C. § 1005,[7] an entry recording an actual transaction on a bank's books exactly as it occurred is not a false entry under that statute even though it is a part of a fraudulent or otherwise illegal scheme.[8] The entries proved under

[7] *See, e.g., United States v. Giles*, 300 U.S. 41 (1937) (omission of deposit slips resulting in inaccurate balances); *United States v. Darby*, 289 U.S. 224, 226 (1933) (forged signature on promissory note); *Agnew v. United States*, 165 U.S. 36, 52-53 (1897) (fictitious deposit); *Coffin v. United States*, 162 U.S. 664, 683-685 (1896); *United States v. Austin*, 585 F.2d 1271, 1274-1278 (5th Cir. 1978) (recording worthless checks as cash assets on books and in report); *United States v. Sheehy*, 541 F.2d 123, 128-129 (1st Cir. 1976) (recording of unsecured loan as secured); *United States v. Bevans*, 496 F.2d 494, 498 (8th Cir. 1974) (omission of certain overdrafts from report); *United States v. Mayr*, 487 F.2d 67, 69 (5th Cir. 1974) (fictitious deposits); *United States v. Pappas*, 445 F.2d 1194, 1200, 1200-1201 (3d Cir.), *cert. denied sub nom. Mischlich v. United States*, 404 U.S. 984 (1971) (fictitious accounts receivable); *Phillips v. United States*, 406 F.2d 599, 600-601 (10th Cir. 1969) (fictitious loans); *United States v. Fortney*, 399 F.2d 406, 407-408 (3d Cir. 1968) (fictitious loans; false reporting of cash assets); *United States v. Biggerstaff*, 383 F.2d 675, 678-679 (4th Cir. 1967) (fictitious loans); *United States v. Harter*, 116 F.2d 51 (7th Cir. 1940) (fictitious loans); *Billingsley v. United States*, 178 F. 653, 661-663 (8th Cir. 1910) (fictitious sales and deposits); *Morse v. United States*, 174 F. 539, 547-550 (2d Cir.), *cert. denied*, 215 U.S. 605 (1909) (fictitious purchases and loans; omission of stock held by bank in report).

[8] *See, e.g., Coffin v. United States*, 156 U.S. 432, 462-463 (1895); *United States v. Manderson*, 511 F.2d 179 (5th Cir. 1975); *United States v. Biggerstaff, supra*, 383 F.2d at 678 (4th Cir. 1967); *Laws v. United States*, 66 F.2d 870, 873 (10th Cir. 1933); *Twining v. United States*, 141 F. 41 (3d Cir. 1905);

(Footnote continued on following page)

Counts 3 through 8 seem to fall within the latter category.

The prosecution was limited to the theory of falsity alleged in the indictment, *Stirone v. United States*, 361 U.S. 212, 218-219 (1960), which was that the entries were false "in light of the true market value of the securities." As we have said, the disparity between the price and market value did not make the entry recording the purchase price false. The convictions under Counts 3 through 8 of the indictment are therefore reversed.

III.

Sufficiency of the Evidence Under Counts 1 and 2: Intent

The foregoing conclusion does not affect the convictions under Counts 1 and 2, which did not depend upon the proposition that the purchase orders and other records were false in that they do not show the difference between the purchase price and the market value of the acquired securities. Because we know from the jury's verdict on Count 2 that the verdict on Count 1 did not rest solely on a determination that the defendants conspired to commit the offenses charged in Counts 3 through 8, reversal of convictions on the latter counts does not require reversal on Count 1. *United States v. Dixon*, 536 F.2d 1388, 1401-1407 (2d Cir. 1976).

Defendants only challenge to the sufficiency of the evidence under Counts 1 and 2 is that the requisite criminal intent was not proved. In addressing that subject in their brief, defendants do not discuss the evidence supporting the verdicts; rather they rely on other evidence and argue that the jury should have acquitted them. Viewing the evidence presented in the

[8] *continued*
United States v. Scoblick, 124 F.Supp. 881, 886 (M.D. Pa. 1954), *aff'd*, 225 F.2d 779 (3d Cir. 1955); *United States v. Young*, 128 F. 111 (M.D. Ala. 1904). *But cf. United States v. Hart*, 551 F.2d 738, 741 (6th Cir.), *cert. denied*, 434 U.S. 920 (1977).

light most favorable to the jury's verdicts, we think it sufficient.

Count 1

Conviction under Count 1 required proof that the defendants agreed to execute the sham transactions with the intent necessary for commission of the substantive crime of deception they allegedly conspired to commit.[9] *See, e.g., United States v. Feola*, 420 U.S. 671, 686-696 (1975); *United States v. Zarattini*, 532 F.2d 753, 760 (7th Cir. 1977). The evidence presented was sufficient to support the inference that they acted with the intent to cause the filing of financial statements that would not disclose the sham nature of the overtrade prices and thus with the intent to conceal losses that otherwise would appear and thereby to deceive readers of the financial statements. Defendants' purpose and motive in agreeing to execute the sham transactions was to conceal the anticipated $800,000 loss on the short sales.[10] If successful, the scheme would necessarily result in materially false financial statements; otherwise the losses would not be concealed. Thus, the jury could well have inferred the necessary intent from the nature of the agreement proved.

Ironically, when it came time to issue financial statements for 1973 and file the 10-K Report, the threat of an $800,000 loss had disappeared and left in its wake

[9] The trial court instructed the jury that specific intent, defined in the conventional way, *see United States v. Arambasich*, ... F.2d ..... (7th Cir. 1979), was an element of both substantive offenses charged. While something less was required for the Securities Exchange Act charge alleged in Count 2, *see United States v. Schwartz*, 464 F.2d 499, 509 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972), the distinction does not affect the result here because we think the evidence supports the jury's apparent finding that defendants acted with the specific intent described in the judge's instructions.

[10] Defendants' testimony that the purpose of the overtrades was to increase the bank's liquidity could properly have been disbelieved by the jury. That testimony was discredited by evidence that many of the securities received in overtrades matured later than the securities traded for them.

another problem, *viz.*, the effect that full disclosure of the true nature of the overtrades would have on the financial statements. Nevertheless, even when they embarked on the conspiracy, the defendants could hardly have intended such disclosure, for it would have defeated the purpose of the overtrades. At least the jury could have inferred that the defendant bankers were not so unsophisticated as to believe that financial records and statements that reported the purchases and sales at sham figures without disclosing the real nature of the transactions were not false, especially when their purpose in doing so was to conceal what they believed would otherwise appear as a substantial loss.

In addition, defendants' own false explanations of the overtrades could properly have been viewed as persuasive evidence of their consciousness of wrongdoing. These consisted of Wilson's disingenuous "thin-market" memorandum to Ernst & Ernst, and Erickson's later explanation to the same effect to the bank's board of directors.[11]

Defendants rely heavily on the difference of opinion between Ernst & Ernst and Arthur Andersen as to what kind of transaction can be deemed a repurchase agreement. The overtrades were not recorded as repurchase agreements, however, and there is no suggestion that either Wilson or Erickson regarded them as such when the conspiracy was formed or when the overtrades were executed. The later difference of opinion between the two accounting firms is of little relevance to the intent with which the conspiracy was entered into. Similarly, defendants argue that because Ernst & Ernst knew of the overtrades before the 1973 financial statements were filed, the jury could only conclude that they acted in good faith reliance on the accountants. As noted above, however, the defendants did not consult Ernst & Ernst until after the overtrades were executed. Whatever Ernst & Ernst's position would have been had

[11] Erickson couched the explanation in terms of what "Wilson said." But since he was well aware that the explanation was not only misleading but blatantly inaccurate, the jury would have been justified in ignoring the attribution.

defendants consulted them, it has little bearing on what intent defendants had in agreeing to engage in overtrading and to falsely report the transactions.

Count 2

Count 2 requires proof that defendants wilfully and knowingly filed and caused to be filed a materially false and misleading 10-K Report by understating the bank's losses for 1973. Much of what we have said applies to this substantive count as well. Under this count, however, the prosecution must prove that the actual filing or the act of causing false or misleading financial statements to be filed was done "wilfully and knowingly."[12]

The defendants argue that, although technically they issued the financial statements, it was not they but Ernst & Ernst who decided how to treat the overtrades in the financial statements and who approved treatment by giving its favorable opinion on the financial statements. The judge had instructed the jury that a good faith defense would be established by proof that Ernst & Ernst was selected in good faith as a competent accounting firm and knew of the transactions, and that defendants gave Ernst & Ernst the facts and relied on that firm to make the proper entries and adjustments in the financial statements. The jury found that defendants had not acted in good faith, and we think the evidence permitted such a finding. There was, as we have noted, evidence of specific misrepresentation by the

[12] No proof of specific intent to violate the securities laws is necessary. *See United States v. Schwartz*, 464 F.2d 499, 509 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972).

It is not clear whether the requirement that defendants act "knowingly" adds anything at all to the requirement that they act "wilfully." *See* 3 Loss, *Securities Regulation* 1986-1987 (1961); ALI, Model Penal Code (Proposed Official Draft) § 2.02 (1962). *But see, United States v. Dixon, supra*, 536 F.2d at 1396, in which Judge Friendly suggests that the term "knowingly" requires something akin to fraudulent intent.

Here the trial court instructed the jury that it does. *See* note 9, *supra*. The proof of intent is adequate even under the stricter standard.

defendants concerning the nature of the overtrades. Although Ernst & Ernst memoranda indicate that the firm knew that overtrades had taken place, the jury might properly have found that the firm was misled by defendants' misrepresentations as to the absence of a reliable market price, and this in turn influenced the firm's view of the materiality of the matter. The accountants' failure to require disclosure of the sham character of the transaction, in view of the amounts involved, is inexplicable if they were aware of the facts, and so the jury might have believed.

Although certified by accountants as prepared in accordance with generally accepted accounting principles, the financial statements are nevertheless the representations of management. *See, e.g., In the Matter of McKesson & Robbins: Report on Investigation* 423 (1940). If a company officer knows that the financial statements are false or misleading and yet proceeds to file them, the willingness of an accountant to give an unqualified opinion with respect to them does not negative the existence of the requisite intent or establish good faith reliance. *See United States v. Colasurdo*, 453 F.2d 585, 594 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). Here defendants knew that they had in substance bartered securities for other securities. They knew they had recorded these transactions as if they were genuine purchases and sales at prices higher than the market prices of the securities. They knew therefore that the cost of the acquired securities and the corresponding loss on the sold securities were not accurately reflected in the records of the transactions. Thus, they knew that unless adjustments were made on the financial statements to reflect the foregoing facts the losses on the sales would be understated and that the carrying value of the securities purchased would be overstated. From all this the jury could have inferred that defendants, knowing that the financial statements were false and misleading, wilfully filed them with the intent to conceal the bank's losses on its securities transactions. That Ernst & Ernst certified the financial statements without requiring any adjustments, did not alter the fact that defendants knew the statements did not properly reflect the overtrade transactions.

As stated by the Second Circuit with respect to similar facts in *United States v. Colasurdo, supra,* "the question is ultimately one of honesty and good faith." 453 F.2d at 594. There was evidence on the basis of which the jury could properly find, notwithstanding the Ernst & Ernst advice and certification, that defendants knowingly and wilfully filed materially false and misleading financial statements.

For the foregoing reasons, and because we find no reversible trial error for the reasons stated in the unpublished order filed with this opinion, the judgments of conviction under Counts 1 and 2 are affirmed. The judgments of conviction under Counts 3 through 8 are reversed.

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Nos. 79-356 and 79-5304

In the Supreme Court of the United States

OCTOBER TERM, 1979

HAROLD ERICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 601 F. 2d 296.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1979. On August 3, 1979, the court of appeals denied a petition for rehearing in No. 79-356 and a

motion to extend the time to petition for rehearing in No. 79-5304. The petitions for a writ of certiorari were filed on September 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' conspiracy convictions must be reversed because the court of appeals found the evidence insufficient to support their convictions for one of the two substantive offenses alleged to be the objects of the conspiracy.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted on six counts of making false entries in the records of the bank of which they were officers, in violation of 18 U.S.C. 1005 (Counts III through VIII), on one count of filing false and misleading financial statements with the Securities and Exchange Commission, in violation of 15 U.S.C. 78m(a) and 78ff (Count II), and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371 (Count I). Petitioners were both sentenced to concurrent terms of six months' imprisonment on each count.

The evidence at trial showed that petitioner Erickson was the chairman of the board of directors of American Bankshares Corporation, a holding company, and its bank subsidiary, American City Bank and Trust Company. He and petitioner Wilson also served as officers of the bank (Pet. App. 2). In early 1973 the bank expected to suffer losses of approximately $800,000 as a result of securities transactions effected by petitioner Wilson (Pet. App. 2-3). In order to conceal these losses in the bank's financial reports, petitioners engaged in a series of

negotiated "overtrades," whereby the bank sold selected securities at inflated prices instead of prevailing market prices (Pet. App. 3). The *quid pro quo* for each of these sales was a concurrent agreement by the bank to subsequently buy from the purchaser other securities of equal value at equally inflated prices (*ibid.*).

The manner in which these transactions were reported formed the basis for the indictment. The bank recorded these transactions as if the purchases were unrelated to the sales and each side of the transaction had been an independent arms-length sale and purchase (*ibid.*). The premium received by the bank on the sale of securities was included in the reported sale price, without disclosure of the agreement to pay a similar premium on the reciprocal purchase of other securities (Pet. App. 4). Similarly, the securities purchased by the bank were recorded at the inflated purchase price instead of their true market value (*ibid.*). In the Form 10-K report filed with the Securities and Exchange Commission for 1973, petitioners understated the bank's losses by more than $400,000 (Pet. App. 6, 9).

The court of appeals reversed petitioners' convictions for making false entries in banking records as charged in Counts III through VIII of the indictment. The court concluded that the evidence was insufficient under those counts because the bank records introduced at trial did not purport to show the market value of the securities, but rather showed only the actual price at which the transactions took place. Although the court acknowledged that entries which inaccurately record transactions or which record fictitious transactions can violate 18 U.S.C. 1005, it held that entries reflecting transactions on the bank's books exactly as they occurred cannot be false entries under the statute even though they are part of a fraudulent scheme (Pet. App. 10-11).

The court of appeals affirmed petitioners' convictions for filing a false Form 10-K as charged in Count II of the indictment. The court also affirmed petitioners' conviction for conspiracy under Count I of the indictment, which charged as objects of the conspiracy both the filing of the false Form 10-K and the making of false entries in the records of the bank (Pet. App. 7-14).

ARGUMENT

Petitioners contend (79-356 Pet. 8-26; 79-5304 Pet. 4-7) that their convictions on the conspiracy count (Count I) are invalid because the court of appeals reversed their convictions for one of the two types of substantive offenses alleged to be the objects of the conspiracy.

This claim is without merit under the circumstances of this case. The substantive offenses charged in the indictment all arose from a single series of securities transactions, the records of which were used to prepare both the entries in the bank's records and the Form 10-K (Pet. App. 2-6). The evidence showed a single scheme to avoid reporting the bank's losses, and there was no evidence from which the jury could rationally have concluded that petitioners' conspiratorial agreement extended to one of these objects but not the other. Under the circumstances, the court of appeals correctly determined that the conspiracy conviction rested on a valid basis (Pet. App. 11):

> Because we know from the jury's verdict on Count 2 that the [conspiracy] verdict on Count 1 did not rest solely on a determination that the defendants conspired to commit the offenses charged in Counts 3 through 8, reversal of convictions on the latter counts does not require reversal on Count 1.

Since the conspiracy had an unlawful substantive objective apart from the offenses charged in Counts III

through VIII, the court of appeals was correct in upholding petitioners' conspiracy conviction. See *United States* v. *Wedelstedt*, 589 F. 2d 339, 341-342 (8th Cir. 1978) (collecting cases); *United States* v. *Dixon*, 535 F. 2d 1388, 1401-1402 (2d Cir. 1976); *United States* v. *James*, 528 F. 2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976); *United States* v. *Papadakis*, 510 F. 2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States* v. *Tanner*, 471 F. 2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *Moss* v. *United States*, 132 F. 2d 875, 878 (6th Cir. 1943). See also *Turner* v. *United States*, 396 U.S. 398, 420 (1970).

Although several courts of appeals have reversed multiple objective conspiracy convictions when reversing convictions for one or more substantive offenses alleged to be objects of the conspiracy (*United States* v. *Carman*, 577 F. 2d 556, 566-568 (9th Cir. 1978); *United States* v. *Tarnopol*, 561 F. 2d 466, 475 (3d Cir. 1977); *United States* v. *Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973)), none of the cases relied upon by petitioners conflicts with the result reached by the court below.[1] In *Tarnopol* and *Baranski*, all of the substantive charges in the indictment were either rejected by a jury verdict of acquittal or were found to be invalid on appeal. Here, by contrast, the jury's conviction of both petitioners on one substantive count, affirmed by the court of appeals, demonstrated that the jury did find that petitioners had conspired to commit at least one federal offense. Nor is the Ninth Circuit's decision in *United States* v. *Carman*, *supra*, in conflict with the decision below. In *Carman*, the court of appeals recognized that a "conspiracy conviction is immune from

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[1] Any difference between the Seventh Circuit's decision in this case and its prior opinion in *Baranski* would reflect at most an intra-circuit disagreement not warranting review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

attack on appeal *so long as no substantive count conviction is overturned because the count failed to state a crime.*" 577 F. 2d at 567 (emphasis in original); see also *id.* at 568.[2] In this case, unlike *Carman*, the court of appeals based its reversal of the substantive convictions on the insufficiency of the evidence proffered by the government to prove Counts III through VIII, not on a failure of the indictment to state an offense (Pet. App. 9-11).[3]

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[2]The court in *Carman* also explained that if the jury "focused" on "other crimes" as well as the crimes that form the basis for substantive convictions that are reversed on appeal, "the conspiracy conviction should be sustained." *Ibid.* Here, the jury's conviction of both petitioners under Count II of the indictment, based on their scheme to conceal financial losses, establishes that the jury "focused" on "other crimes" adequately proved by the government.

[3]Petitioners' reliance on *Stromberg* v. *California*, 283 U.S. 353 (1931), is equally misplaced. *Stromberg* dealt with a conviction on a single substantive count, which, under the instructions to the jury, may have rested on any of three separate theories, one of which was inconsistent with the Constitution. This Court reversed the conviction because it was impossible to determine from the general verdict whether the conviction had a permissible basis. This case, unlike *Stromberg*, involves convictions on a conspiracy count and a valid substantive count alleged as an object of the conspiracy and presents no issue of a conviction resting on an unconstitutional theory.

The case that comes closest to conflicting with the decision of the court of appeals in this case is *United States* v. *Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). In *Dansker*, the defendants were convicted under a three count indictment alleging conspiracy to commit bribery and bribery of two persons. The court of appeals vacated one of the substantive bribery convictions and held that, in the circumstances there involved, the conspiracy conviction must also be vacated. The question in *Dansker* was the essentially factual question whether the jury might logically have found (537 F. 2d at 51) a conspiracy only as to the invalidated substantive charge. The court concluded that the jury could have done so in that case, involving two separate bribees. It is not clear that the *Dansker* court would reach the same result in the different factual situation presented here. In the present case, there is no realistic possibility that the jury could have convicted petitioners

In any event, even if the issue presented by petitioners were otherwise deemed appropriate for review by this Court, review is not necessary in this case. Petitioners each received a sentence on the conspiracy count (Count I) equal to and concurrent with the sentence imposed on the remaining substantive count (Count II).[4] There is therefore no need for this Court to review petitioners' challenge to the conspiracy conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976). Even assuming

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solely for engaging in a conspiracy to make false bank entries, and not for conspiracy to file a false Form 10-K. The bank entries and the Form 10-K reflected a single series of securities transactions and were prepared pursuant to a single scheme intended to conceal the losses resulting from those transactions, a scheme in which both petitioners were participants as confirmed by their substantive convictions under Count II of the indictment (see Pet. App.12). See *United States* v. *Dixon*, *supra*, 536 F. 2d at 1401-1402.

[4]Petitioners argue (79-356 Pet. 26-27; 79-5304 Pet. 7-8) that their convictions under Count II should be reversed because evidence was introduced at trial relating to the invalidated convictions under Counts III-VIII. However, they have made no showing of any kind that evidence regarding the entries in the bank records could have prejudiced the jury's evaluation of the evidence regarding the false Form 10-K. Nor have they challenged the sufficiency of the evidence showing that they caused a false Form 10-K to be filed. Moreover, given the close relationship between the Form 10-K and the bank records, and the scope of evidence relevant to prove the conspiracy to file a false Form 10-K, proof of the bank entries would have been admissible even if the indictment had been limited to the offenses charged in Counts I and II. *United States* v. *Wedelstedt*, *supra*, 589 F. 2d at 341, and *United States* v. *Papadakis*, *supra*, 510 F. 2d at 297, lend no support to petitioners' claims. Although noting that an overwhelming amount of evidence relevant only to the invalid portion of a conspiracy charge might be prejudicial and require reversal of a conspiracy conviction, both courts adopted the general rule that a conspiracy conviction will be upheld so long as the evidence shows that the defendant agreed to accomplish one of the criminal objectives.

that petitioners' convictions for conspiracy were reversed, such action would not affect their sentence, would not avert any collateral consequences, and would not affect the time that they must serve before release on parole under the guidelines of the United States Parole Commission (28 C.F. R. 2.20). Compare *Rubin* v. *United States*, 439 U.S. 810 (1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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